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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

CITY OF EL SEGUNDO; J.C. DEVILBISS; JAMES JOHNSON and JOHN HAMPTON,
Petitioners, Appellees and Defendants,

vs.

DEBORAH LYNN THORNE,
Respondent, Appellant and Plaintiff.

Appeal from the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a police department constitutionally reject a police officer applicant on the basis that, while she was working as a clerk-typist for the department, she was sexually involved with another employee, a married police sergeant?

2. If a police department may not consider an employee's sexual relations in rejecting an applicant, must the case be remanded to determine if the applicant would still have been rejected for permissible reasons?

3. If the Court of Appeals determines that the defendants rebutted the plaintiff's *prima facie* case in a Title VII action, may the Court of Appeals still hold that the district court was "clearly erroneous" when it found that the plaintiff's application was rejected for legitimate, nonpretexual reasons?

4. Were the trial court's findings for the defendants in the Title VII action "clearly erroneous"?

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I

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court are unreported. (Appendix A, *infra*, pp. A-1 to A-9.) The Opinion of the Court of Appeals is officially reported at 726 F.2d 459. (Appendix B, *infra*, pp. A-10 to A-32.) Defendant's petition for rehearing and suggestion for rehearing en banc was denied by Order of the Court of Appeals. (Appendix C, *infra*, p. A-33.)

II
JURISDICTION

Petitioners seek review of the Opinion of the Court of Appeals, which was entered November 21, 1983. The Order of the Court of Appeals denying the petition for rehearing en banc of Petitioners was entered on February 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III
STATUTORY PROVISIONS INVOLVED

Two federal statutes are at issue: Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*, and hereinafter "Title VII") and the Civil Rights Act of 1871 (42 U.S.C. § 1983, and hereinafter "Section 1983"). Both statutes are set forth in Appendix D, *infra*, pp. A-34 to A-64.)

IV
STATEMENT OF THE CASE

Respondent, Deborah Lynn Thorne ("Thorne") sued Petitioners City of El Segundo ("City"), J.C. Devilbiss, ("Devilbiss"), James Johnson ("Johnson"), and John Hampton ("Hampton") on two theories.

Thorne's first claim was based on Title VII of the Civil Rights Act of 1964 and was against the City alone. The Title VII claim alleged that the City discriminated against Thorne in its employment practices on the basis of sex by treating her differently from similarly situated males.

Relying on Section 1983, Thorne's second claim was directed solely at the individual Petitioners, Johnson, Devilbiss and Hampton. It alleged that these individuals conspired to misuse a polygraph test to obtain improperly information concerning Thorne's sexual activities and prevent her appointment as a City police officer.

At trial, the Honorable Manuel L. Real, now Chief Judge of the United States District Court for the Central District

of California, granted the motion of Johnson, Devilbiss and Hampton for dismissal of the Section 1983 claim pursuant to Rule 41(b) of the Federal Rules of Civil Procedure at the close of Thorne's case. At the end of the case, the trial court ruled in favor of City on the Title VII action.

V

STATEMENT OF FACTS

The crux of this case is why Thorne was found unqualified to be appointed to City's police force.

Thorne was first employed by City as a clerk-typist in the traffic section of its police department in December, 1973. She performed satisfactorily during the ensuing five years, but had persistent problems with tardiness and taking excessive sick leave as reflected in her evaluation records up to the middle of 1978. Compared to the other two final candidates for the police officer position, her sick time records were notably excessive. (Appendix A, Finding 5 p. A-2.)

During her employment, Thorne dated several City police officers, one of whom was married. This last relationship resulted in a pregnancy which was terminated in April, 1977.

In mid-1977, Respondent determined that she wished to be a police officer. Without having taken any police courses aside from a few uncompleted units at a local community college, and never having served as a reserve police officer or police cadet, she applied to a number of cities for positions.

In January, 1978, City published a notice seeking to fill an opening for a police officer trainee. Recruitment was on a promotional basis: that is, limited to employees of the City.

The City gave the applicants a series of tests consisting of an oral interview board, a written examination, a physi-

cal agility test, written and oral psychiatric tests, and a background investigation including a polygraph test.

On her oral board examination, the three persons rating Thorne gave her the lowest acceptable rating, and noted that she did not seem to have fully prepared or motivated herself for a law enforcement career. The oral board was composed of officers from other jurisdictions besides City. Respondent testified that she did not believe her low rating was the result of prejudice against her as a woman.

Similarly, Thorne barely passed the minimum standards on her physical agility test. (Appendix A, Finding 11, p. A-3.)

During the initial background investigation, the City's investigator noted that on the medical history portion of her City application, Thorne had indicated hospitalization for a "female problem" in April, 1977. However, in her application to another city, she indicated pregnancy. Concerned that Thorne might have a medical problem that could disqualify her as a police officer, the investigator asked Hampton, the polygraph examiner, to find out more.

The City had been using Hampton as its polygraph examiner for a number of years. Hampton, a retired Los Angeles police officer and instructor in police science at a local college, also conducted personnel background investigations for many other police departments.

When Hampton asked Thorne about her medical history, she said she had become pregnant by a City police officer. Concerned by a possible need for intra-departmental investigation, Hampton questioned her further. Thorne first told him that the officer was no longer with the department. Ultimately though, Thorne admitted that the father was a married City police sergeant, who was still with the department.

The remainder and great bulk of the polygraph examination consisted of written and oral questions concerning Thorne's general background, and focused upon possible criminal activity, drug and alcohol use and previous employment.

Based upon his long experience as a police officer and as an instructor of police science, Hampton believed that Thorne lacked sufficient aggressiveness and assurance to handle stress situations common to law enforcement. He also believed that she showed a lack of necessary motivation because she had not gone into a cadet or reserve officer or any other preparatory program. He suggested that she consider entering such programs to provide additional preparation for a law enforcement career. Hampton advised Chief Johnson of these conclusions in a report.

In a second supplemental report, Hampton advised Chief Johnson on the relationship with the City police sergeant and the termination of the pregnancy in April, 1977. This document made no recommendation as to action and was kept separate, for the "eyes only" of the Chief of Police.

Thereafter, Chief Johnson requested Captain Devilbiss to supervise the balance of the investigation personally to avoid dissemination of the background information at other levels in the organization. Devilbiss' report included the other background material, and cited Thorne's poor attendance and lack of motivation and recommended that she not be hired. In the meantime, the psychological report on Respondent was received. It stated, in substance, that Thorne would be acceptable as a police officer, but that she was immature, and needed to be "closely supervised."

After taking the initial oral and written tests, Thorne had been placed second on a list of four in the selection process behind another woman named Jeannie Metcalf, and ahead of a male named Allison Graham. Thorne and

Graham were almost identical in their total scores, but Metcalf clearly surpassed them both.

Johnson ultimately reached the conclusion that Thorne did not possess the minimum qualifications necessary for a city police officer. Chief Johnson rejected Thorne's application for a number of reasons which included poor work habits in relation to tardiness and sick leave, lack of motivation, and lack of aggressiveness or self-assurance to handle herself in stressful situations. He also took into consideration all of her personnel evaluations during the course of her employment. He specified the criteria of integrity, candor, aggressiveness and ability to control stress situations as the qualities he looked for in hiring police officers. At the time he became Chief of Police in 1971, there had been no female officers employed by City, and during his tenure three had been employed, of whom one had left. In addition, 12 out of the 25 police cadets hired had been female.

Although the district court found that the affair was irrelevant to the hiring decision (Appendix A, Findings 28, 29, p. A-6), in the past, Chief Johnson had disqualified male applicants because they had had sexual relations with married women both on and off duty. Sexual relations among police officers is a matter of concern due to possible adverse effect on morale and assignments. (Appendix A, Finding 30, p. A-6.) However, Johnson would not have hired Thorne as a police officer even if there had been no sexual matters involved. (Appendix A, Finding 29, p. A-6.) Ultimately, the male candidate was hired because the female applicant who placed first on the ratings, Jeannie Metcalf, had accepted a police officer position with another city, although, as Metcalf testified, Johnson had told her he saw no reason that she could not be hired so long as she passed the remaining tests. Johnson believed Metcalf was capable of being a police officer in that she met all the requirements of motivation and the like described above.

Regarding the affair, Chief Johnson did not formally discipline either Thorne or the police sergeant; however, neither were promoted.

Upon hearing all the evidence, including having the opportunity to observe the credibility and demeanor of the Respondent, Thorne, of the individual Petitioners, Chief Johnson, Captain Devilbiss, and Mr. Hampton, and of the other witnesses, the trial judge found that Respondent was disqualified on the basis of "objective factors such as . . . tardiness and sick time record as compared to the other candidates and subjective factors applied in good faith, such as aggressiveness, self-assurance, motivation, candor and high moral standards" which were "valid and were applied equally to both male and female applicants for police officer positions." (Appendix A, Finding 26, p. A-6.)

Regarding the Section 1983 action, the trial court found that the inquiry by Hampton (a private party under contract to City) into Thorne's sexual relations with a City police officer during the time Thorne was clerk-typist for the City's police department was an "appropriate matter of inquiry with respect to employment in light of their possible adverse effect on morale, assignments, and the command-subordinate relationship." (Appendix A, Finding 30, p. A-6.) The trial court further found that the actual impact of the sexual information on the decision to disqualify was "unascertainable", and even if it had not been disclosed, Thorne would not have been hired in any event. (Appendix A, Findings 28, 29, p. A-6.)

On appeal the Ninth Circuit reversed. Despite the trial court's findings that Thorne was disqualified for legitimate reasons, the Court decided that City officials disqualified Thorne because they believed women generally were physically unable to be police officers and because they applied sexual conduct criteria to her that were not applied to men.

VI

JURISDICTION IN THE FEDERAL DISTRICT COURT

Respondent brought suit in the United States District Court for the Central District of California. Respondent invoked the district court's jurisdiction for the Title VII claim pursuant to 28 U.S.C. § 1343, and for the Section 1983 claim pursuant to 28 U.S.C. § 1343(3).

VII

ARGUMENT

A. Summary of Reasons for Granting the Petition

The primary reason Supreme Court review is necessary is to resolve a split among the Circuits over the right to privacy.

In *Paul v. Davis,* 424 U.S. 693 (1976), this Court seemingly held that there is only a very limited constitutional right to nondisclosure of private information. However, after *Whalen v. Roe,* 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), the "confidentiality" aspect of the right to privacy became a hotly disputed issue among the Circuits.

One particularly disputed question is whether public employers may consider immoral or indecent sexual conduct in their hiring decisions. In addition, there is the question whether a nepotism rule violates the right to privacy; for example whether two cohabitants, married or not, may work in the same department.

The Ninth Circuit held in this case in favor of a very broad and general constitutional right of sexual nondisclosure, and that any intrusion into the right of privacy must be subject to "heightened scrutiny." (Appendix B, p. A-29.) By contrast, *Shawgo v. Spradlin,* 701 F.2d 470 (5th Cir. 1983), *cert. den.* ..... U.S. ....., 104 S. Ct. 404, 78 L.Ed

345 (1984), specifically held that police departments may consider sexual conduct in employment decisions. And in *Espinoza v. Thoma,* 580 F.2d 346 (8th Cir. 1978), it was held that unmarried couples could be prohibited from working together.

Supreme Court review is necessary to bring these disparate views into conformity.

Beyond the privacy issue, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in its treatment of Thorne's Title VII claim that this Court's review is necessary. In *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), this Court held that in order for an employer to rebut a *prima facie* case of discrimination, it must present evidence sufficient to justify a judgment in its behalf. The Ninth Circuit held in this case that the City did rebut Thorne's case by presenting evidence that Thorne was "disqualified for non-discriminatory reasons such as tardiness and psychological factors." (Appendix B, p. A-18.)

Remarkably, the Ninth Circuit still reversed the trial court, holding that the City's asserted legitimate reasons were pretextual. Petitioners contend that as a matter of law, a Court of Appeals cannot on one hand determine that the City articulated a legitimate, non-discriminatory reason sufficient to rebut the *prima facie* case, but then reverse a trial court, and find that defendants acted for discriminatory reasons; if there is enough evidence to find the employer rebutted the employee's *prima facie* case, then there is also evidence enough to support the trial court's finding of no pretext.

That the Ninth Circuit further weighed the sufficiency of the City's evidence, when it was already sufficient to rebut the *prima facie* case, and when the trial court made detailed findings of fact of no pretext, can only indicate

that the Court of Appeals arbitrarily reassessed the credibility of the witnesses, and placed the burden of persuasion on the employer in violation of the *Burdine* requirement that the ultimate burden of proof be on the Plaintiff.

B. An Employer May Consider Sexual Conduct in Hiring Decisions.

The Ninth Circuit held that "the district court erred in finding that neither the questioning of appellant regarding her sex life nor reliance on the information obtained about her sex life violated her privacy and associational interests." (Appendix B, p. A-31.)

The Court of Appeal's conclusion is contrary not only to previous constitutional law, but also, by not considering proximate cause, contrary to the standards for appellate review.

1. The Right to Privacy Is Not Boundless; Inquiry Into an Applicant's Relationships With Other Employees Is Permitted.

In *Paul v. Davis,* 424 U.S. 693 (1976), the respondent alleged that circulation to merchants by police of the fact of his arrest (but not conviction) for shoplifting violated his constitutional right to privacy. This Court recognized that "zones of privacy may be created by more specific constitutional guarantees...." *Id.,* at 712-713. However, this Court held, "personal rights found in [the] guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' . . . Respondent's claim is far afield from [the privacy] line of decisions." *Id.,* at 713.

The reason *Paul* held that disclosure of arrest records does not implicate the right to privacy is not difficult to fathom. This Court simply rejected the Respondent's attempt to "transmute" an ordinary claim for defamation under State law into a constitutional violation merely

because the Petitioners were local government officials. 424 U.S. at 698-99.

By transforming an ordinary employment decision into a constitutional violation, the Ninth Circuit opinion in this case reaches the result rejected in *Paul*. Basing its opinion on *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Ninth Circuit held that the mere *disclosure* of an applicant's sex life as it relates to other employees is *constitutionally* forbidden, in the absence of pre-existing guidelines limiting the inquiry. (Appendix B, p. A-29.)

In fact, *Whalen* upheld New York's requirement that the names and addresses of all persons who obtained certain drugs be recorded in a central computer file. In the course of its discussion the Court stated:

> "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." 429 U.S. at 598-600.

Accord, Nixon, 433 U.S. at 457.

If one of the two rights to privacy described in *Whalen* and *Nixon* are implicated in this case, it could only be the right to keep personal matters confidential. The other branch of privacy concerns "autonomy" in making decisions in matters like marriage, *Loving v. Virginia*, 388 U.S. 1 (1971), contraception, *Eisenstaedt v. Baird*, 405 U.S. 438 (1972), and abortion, *Roe v. Wade*, 410 U.S. 113 (1977).

This "autonomy" type of privacy cannot be at issue in this case because the Petitioners never interfered with Respondent's decision to have sexual relations or an abortion; in fact, both events were long concluded when Thorne

applied to the police department. Consequently, if Petitioners did violate Thorne's constitutional right to privacy, it could only be in the disclosure of her affair with the police sergeant. (*See, Whalen*, 429 U.S. at 603 where the "right to decide independently" was not at issue because the State only required disclosure of drug use, and did not prohibit drug use.)

Regarding the "confidentiality" branch of privacy, which is potentially applicable in this case, this Court has provided substantial guidance. In *Whalen v. Roe*, 429 U.S. at 601-602, the Court emphasized that without "*public* disclosure" of the information received by the state agencies, there was no privacy violation, because:

> "Disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of a modern medical practice even when the disclosure may reflect unfavorably on the character of the patient."

In *Nixon v. Administrator of General Services*, 433 U.S. 425, this Court considered the right to confidentiality in the context of a Federal Act requiring the Administrator of General Services to screen the Presidential materials (documents and tapes) of President Nixon, and return those materials private in nature, and retain in government archives the remainder.

In affirming the Act, this Court began by noting that, like in *Whalen*, the Act took precautions "at preventing undue dissemination of private materials." *Id.*, at 458. More importantly, the Court noted that although the Act "requires some intrusion into private communications unconnected with any legitimate government objectives," *id.*, at 463, the

screening was still legitimate because it was not "an unreasonable solution to the problem of separating commingled communications." *Id.* at 465

The Circuits have not had an easy time in applying *Paul, Whalen* and *Nixon* to investigations into employee sexual activities.

In *Shawgo v. Spradlin,* 701 F.2d 470 (5th Cir. 1983) *cert. den., sub nom Whisehunt v. Spradlin,* No. 82-2148, ... U.S. ....., 78 L.Ed.2d 345, 104 S.Ct. 404 (Justices Brennan, Marshall and Blackmun dissenting, 1984) two former police officers sought reinstatement and damages when the City of Amarillo disciplined them for off-duty dating and cohabitation. As in this case, the plaintiffs in *Shawgo* did not violate a specific city policy; they were disciplined for violating a regulation prohibiting conduct that "if brought to the attention of the public, could result in justified unfavorable criticism of that member or the department." 701 F.2d at 472.

The Fifth Circuit, essentially following *Paul v. Davis,* held the discipline was constitutionally imposed:

> "The circumstances under which Whisenhunt was demoted may not seem 'fair' to us as judges, and we may hope that state judicial review affords a remedy for such unfairness as is perceived by us. Nevertheless, a federal court must heed the dictates of federalism that, where there is not an independently protected constitutional right, a federal court is not the appropriate forum in which to review 'the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs.' [Quoting from *Bishop v. Wood,* 426 U.S. 341, 349 (1974)]" 701 F.2d at 478-479.

The *Shawgo* court then directly addressed privacy. Relying on *Kelley v. Johnson,* 425 U.S. 238 (1978), (which

affirmed a police department's right to regulate the dress of its officers), the court found no constitutional violation because "we can ascertain a rational connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit." 701 F.2d at 483.

The Ninth Circuit in this case chose to apply standards entirely different from *Shawgo*. The Circuit held that the lack of specific City rules limiting the background investigation demanded a federal remedy, explaining that:

> "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests, as the questioning of the polygraph examiner did in this case, an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the *heightened scrutiny* with which we must view the state's action." [Emphasis added.] (Appendix B, p. A-29.)

The Ninth Circuit's application of "heightened" (*i.e.* strict) scrutiny departs drastically from prior precedent. While *Nixon, Whalen* and *Paul* are unclear, most Circuits have followed either an "intermediate," or "rational basis" balancing test. *See, Barry v. City of New York*, 712 F.2d 1554, 1559 (2nd Cir. 1983), and cases cited therein.

In reviewing the disclosure in this case, both the government's and the individual's interests must be balanced.

The City's interest is two-fold. First, there is the interest in the orderly operation of its police department, which may be impaired when two former lovers are working together in a hierarchical command system. The Ninth Circuit, itself, has recognized this concern. In *Parsons v. County of Del Norte*, 728 F.2d 1234, 1238, fn. 3, (9th Cir. 1984), it applied a no-nepotism rule to married couples, but also, by citing with approval *Espinoza v. Thoma*, 580

F.2d 346 (8th Cir. 1978), approved of such a policy for unmarried couples.[1]

Second, case law has repeatedly permitted public officers to be held to high moral standards. *See, Kelly v. Johnson*, 425 U.S. 239 (dress code); *Hollenbaugh v. Carnegie Free Library*, (W.D. Penn. 1977) 436 F.Supp. 1328, *affirmed* 578 F.2d 1374 (3rd Cir. 1978), *cert. den.* 439 U.S. 1052 (Justice Marshall dissenting, 1978) (librarian fired for extramarital affair with janitor); *Wilson v. Swing*, 463 F.Supp. 555 (M.D. N.C. 1978) (police officer disciplined for extramarital affair with another officer); *Suddarth v. Slane*, 539 F.Supp. 612 (W.D. Vir. 1982) (state trooper disciplined for adultery; fact that other officers not disciplined for adultery irrelevant).[2]

On the other hand, there is the individual's interest. However, it does not turn on whether there are guidelines regulating disclosure as the Ninth Circuit held. (Appendix B, p. A-29.) The very nature of a background investigation is that relevancy is not always obvious, and the investigator must be able freely to inquire in order to determine what is relevant. See, *Nixon v. General Administrator*, 433 U.S. 425, 413-65 (regarding the difficulty in separating the private from the public).

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[1]*Espinoza*, relying on *Yukas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), explained a number of reasons applicable to this case supporting a no-cohabitant rule. First, the relationship often generates intense emotion, which becomes impossible to put aside if the cohabitant is also a co-worker. Second, if one cohabitant becomes involved in a grievance, the second is likely to join in, hampering an expeditious resolution. Third, if one is the other's supervisor, the supervisor may find it difficult to exercise authority, and other co-workers are likely to be jealous.

[2]Admittedly, not all courts have held that extramarital affairs are grounds for discipline. *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983); *Swope v. Bratton*, 541 F.Supp. 99 (W.D. Ark. 1982); *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1979).

Rather, this Court has recognized that the critical interest of the individual is in avoiding overly-broad public disclosure. See, *Whalen*, 429 U.S. at 601-02; *Nixon*, 433 U.S. at 458.[3]

In this case, there was *no* public disclosure. The Ninth Circuit stated: "The affair was not a matter of public knowledge. . . ." (Appendix B, p. A-31.) Accordingly, the City's interest in the information outweighs Thorne's interest in non-disclosure, and there was no constitutional violation.

2. If Thorne's Privacy Rights Were Invaded, the Information Disclosed Was Not the Proximate Cause of the City's Decision.

Should the Court find that Thorne's privacy right was violated, this case then becomes identical to *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, a school board denied tenure to a teacher on several grounds, one of which violated the First Amendment (*i.e.*, a conversation with the radio station regarding school policies) and another which was constitutionally permissible (*i.e.*, making an obscene gesture toward students).

In resolving *Mt. Healthy*, this Court held that even if "a dramatic and perhaps abrasive incident" effects a hiring decision, the employee must demonstrate that the protected

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[3] Prior to this case, the Ninth Circuit shared this Court's view that a balancing of the government's interest against the breadth of disclosure was necessary. See *York v. Storey*, 324 F.2d 450 (9th Cir. 1963) (Section 1983 claim stated by a female plaintiff who had gone to a local police station to report an attack and was duped by the officer taking the report into posing nude for unnecessary pictures which had then been *circulated* among others); and, *Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969) (police providing information to a radio station that plaintiff had been a criminal suspect was not a "gross abuse," and consequently, not violative of Section 1983).

conduct was the proximate cause of the hiring decision, and not merely that "the protected conduct makes the employer more certain of the correctness of its decision." 429 U.S. at 285-286.

The situation in *Mt. Healthy* was identical to the situation the district court posed to the Ninth Circuit. The district court found that the City would have made the same employment decision regardless of Thorne's sexual conduct. (Appendix A, Finding 29, p. A-6.)

However, in reviewing the record, the Ninth Circuit found evidence that "both Johnson and Devilbiss admitted that [the affair] was a factor in their evaluation of Thorne." (Appendix B, p. A-21.) Apparently, Thorne's sexual history was such a "dramatic" incident that the Ninth Circuit assumed there must be a constitutional violation without noting the district court's finding that the City would never have hired Thorne even if it had known of her sexual activities.[4] Nevertheless, *Mt. Healthy* demands that the district court's original finding be followed. At the

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[4]The Ninth Circuit was aware of the record on proximate cause, but attempted to make light of it:

> "The only evidence in the record that supports the district court's finding is an isolated statement by Chief Johnson to the effect at Thorne's unemployment compensation hearing that he would not have hired Thorne regardless of her affair with the police officer." (Appendix B, p. A-32, n. 11).

This remark of the Court of Appeals is totally erroneous. Chief Johnson's statement was in fact made at Thorne's personnel grievance hearing before the City Manager shortly after the refusal to promote her. It was also made to her in the form of a memorandum in August, 1978 which was in evidence at the trial. Chief Johnson also testified to that effect at the trial. In its eagerness to find error, the Court of Appeals chose to consider the testimony of the chief in the manner described in its footnote. The trial court had before it all the evidence, observed the witness and was best positioned to determine what the testimony was and its believability.

very least, this Petition should be granted to correct this error of law.

C. The Circuit Improperly Placed the Burden of Proof on the Employer in the Title VII Cause of Action.

1. The Ninth Circuit Did Not Follow This Court's Decision in Burdine Regarding Burden of Proof.

The only reason the Ninth Circuit could have disregarded the trial court record and reversed the trial court judgment is because it misunderstood that under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the burden of persuasion in a Title VII case remains with the plaintiff, even as to proximate cause.

In reviewing this case, initially, the Ninth Circuit followed *Burdine*. First, it found that Thorne had established a *prima facie* case. Then, it found the City rebutted the *prima facie* case, stating that "we agree with the District Court's conclusion that the City met this burden of production by presenting evidence that Thorne was disqualified for non-discriminatory reasons such as tardiness and psychological factors." (Appendix B, p. A-18.)

The significance of the Circuit's holding must be emphasized. This Court explained in *Burdine* that in order for an employer to rebut a *prima facie* case, it must introduce admissible evidence, "legally sufficient to justify a judgment" on its behalf. *Id.*, at 255. This should mean that once the Circuit held the City had rebutted Thorne's *prima facie* case, it could not then turn around and reverse on the ground that the trial court's finding that Thorne was rejected for pretextual reasons was "clearly erroneous."

Why the Court of Appeals reversed can be found in its discussion of Thorne's evidence of pretext, where it stated:

> "[O]ur inquiry at this stage in the proceeding is whether this evidence, in the face of the Thorne's contrary evidence that discriminatory reasons were the

> actual basis for her rejection, was sufficient to support the trial court's judgment in favor of the City. We conclude that it does not." (Appendix B, p. A-18.)

Burdine certainly permits the plaintiff to offer evidence that the employer's alleged non-discriminatory reasons were pretexual. *Id.*, at 256. However, the above passage regarding the weighing and sufficiency of the City's evidence suggests that the employer is expected to *prove* it did not discriminate. This is contrary to the requirement of *Burdine* that the burden of persuasion always rest with the employee, even as to pretext. *Id.*, at 256. *Burdine* only requires that the employer *articulate* non-discriminatory reasons and produce evidence thereof to satisfy its burden. To weigh further the sufficiency of the employer's evidence, when it is already sufficient to rebut the prima facie case, in light of detailed trial court findings of fact of no pretext, can only indicate that the Court of Appeals arbitrarily reassessed the credibility of the witnesses, and placed the burden of persuasion on the employer in violation of *Burdine*.[5]

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[5]A possible explanation of the Ninth Circuit's confusion over *Burdine* is found in *LULAC v. City of Salinas Fire Department*, 654 F.2d 557 (9th Cir. 1981). *LULAC* concerns the requirement that the employee demonstrate that discrimination was the proximate cause of the adverse employment decision before reinstatement and back-pay is ordered.

In *LULAC*, 654 F.2d at 559, the Ninth Circuit states that *Burdine* does not apply to proximate cause:

> "*Burdine* declared that '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.' 101 S.Ct. 1093. Where, as here, the plaintiff has proved intentional discrimination, *Burdine* no longer applies."

To the contrary, *Burdine* places the burden of persuasion on the plaintiff in all circumstances, 450 U.S. at 256, including proximate cause.

2. There Was Sufficient Evidence to Support the District Court's Judgment as a Matter of Law.

Federal Rule of Civil Procedure 52(a) states:

> "Findings of fact shall not be set aside unless clearly erroneous, *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" [Emphasis added.]

This Court has explained that the appellate court may reverse factual findings under Rule 52(a) only where "on the entire evidence [it] is left with a definite and firm conviction that a mistake has been committed." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969). However, while the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) applies to factual findings generally, the Rule mandates special treatment of determinations of credibility by trial courts.

Rule 52(a) does not refer solely to findings of fact, but also separately states that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The Circuits have repeatedly held that this second phrase creates an even higher standard of review when the demeanor of the witnesses is at issue. The Ninth Circuit has often considered this phrase.[6] In *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 412 (9th Cir. 1981), the Court stated "that the trial court's appraisal of the credibility of witnesses is to be accepted without challenge." *Accord, Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408,

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[6] *Also see, United States v. $84,000 U.S. Currency*, 717 F.2d 1090, 1095 (7th Cir. 1983) ("particular deference [should] be given to the district judge, who had the opportunity to observe the testimony and demeanor" of the witnesses); *Alabama By-Products v. Local No. 1881*, 690 F.2d 831, 833 (11th Cir. 1982) ("Great weight must be given to the trial court's findings and inferences, especially when the demeanor and credibility of the witnesses form the basis of the court's determination").

414 (9th Cir. 1978), ("the trial court's appraisal of the credibility of the witness is to be accepted; *no challenge to such appraisal is permitted at the Appellate level*" [Citation omitted, emphasis added]).

At the trial, although documentary evidence was relevant, the case turned on the testimony and credibility of the witnesses. Yet, the Ninth Circuit's opinion repeatedly disregards the trial court's findings of fact regarding credibility. In the interests of brevity, Petitioners will not enumerate all the instances where the Court of Appeals violated Rule 52, except the two most noteworthy.

The Circuit's opinion states that Chief Johnson did not actually testify that he disqualified Thorne for appointment to the force for poor work habits, lack of previous interest in becoming a police officer, lack of sufficient aggressiveness or self-assuredness in stressful situations (Appendix B, p. A-22). This conclusion misreads the Record. Johnson testified as follows:

> "Q. You mention your own observations. Are you saying that you took into consideration your observations of Miss Thorne in judging her assertiveness, her presence, her psychological qualities?
>
> A. Yes." (Appendix E, Clerk's Record of Transcript, p. A-65.)

Moreover, while the Ninth Circuit simply omitted the above testimony of Chief Johnson, it also made one rather bizarre evidentiary ruling. In its attempt to disregard all the evidence contrary to its decision, the Court of Appeals also disregarded Hampton's report that Thorne lacked "sufficient aggressiveness, self-assuredness or probable physical ability to presently handle herself in stress situations." (Appendix B, pp. A-22 to A-23.) The claimed basis for this ruling is that there was "no evidence in the record to show that Mr. Hampton was qualified to perform a psychological examination of Thorne." (Appendix B, p. A-23.)

At no point during the trial of this case did Thorne or her attorneys ever challenge the qualifications of Hampton to give the testimony he did. Neither did the trial court ever raise this issue. For the Court of Appeals to now raise this issue after Thorne has already waived it flies in the face of proper appellate procedure. Moreover, Hampton was qualified to give his testimony because of his long history of providing personnel investigations for many police departments and his educational background as a teacher of police science courses at a nearby college. Finally, regardless of his expertise Hampton's testimony was not just offered for its truth, but also to show that Chief Johnson did not have discriminatory intent in rejecting Thorne.

Rather than consider Hampton's direct evidence on Thorne's psychological traits, the Circuit (Appendix B, p. A-19) preferred to emphasize Captain Devilbiss' testimony that he though women generally were not strong enough to be police officers, (although it omits mentioning that Devilbiss also thought that it did not take an exceptional woman to be an officer). The Circuit concludes that Devilbiss' single statement proves Thorne was rejected because of defendants' "preconceived ideas about women." (Appendix B, p. A-19.)

At best, this is ambiguous testimony. Just because Captain Devilbiss believed that women generally were not strong enough to be police officers is only a recognition of his belief that the majority of women do not have the strength to be police officers. He did not state that no woman could be a police officer. He did not recommend that Thorne not be hired because of gender, but stated other grounds. Moreover, Devilbiss' testimony is consistent with this Court's own views on the nature of jobs requiring confrontation with potentially violent criminals. In *Doth-*

ard v. Rawlinson, 433 U.S. 321, 335 (1977), the Supreme Court stated that:

> "A woman's relative ability to maintain order in a male, maximum security, unclassified penetitiary of the type Alabama now runs could be directly reduced by her womanhood."

Of course, unlike in *Dothard*, the City does not claim that women cannot become police officers, and Chief Johnson testified that he does not believe that women as a class are unable to be police officers. However, it is unreasonable to conclude on the basis of one advisor's belief that not all women are physically able to be officers, that the City had a stereotype preventing it from evaluating any particular female applicant fairly.

The Ninth Circuit opinion in this case demonstrates the underlying problem with an Appellate Court overruling findings of fact by a trial court. Chief Johnson repeatedly emphasized the importance of "command presence" or aggressiveness as a vital component of being a police officer. The trial court had the opportunity to observe Thorne and determine for itself if she had "command presence." The Appellate Court lacked this opportunity to corroborate itself whether Johnson was speaking truthfully. Consequently, not having seen the demeanor of Thorne, the Ninth Circuit is not in a position to reverse such evidence depending upon the witnesses' credibility.

VIII
CONCLUSION

This Court should review this case to correct the confusion among the Circuits regarding the use of information of sexual activities in employment decisions, and the Ninth Circuit's misapplication of *Burdine* in Title VII cases. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DATED: May 23, 1984.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN
RICHARD R. TERZIAN
KATHERINE E. STONE
SCOTT F. FIELD

By KATHERINE E. STONE
Attorneys for Petitioner

(Appendices follow)

Appendix A

Findings of Fact and Conclusions of Law

United States District Court, Central District of California

Deborah Lynn Thorne,
Plaintiff,

v.

City of El Segundo, J. C. Devilbiss,
James Johnson and John Hampton,
Defendants.

No. CV 79-3776-R

[Filed: July 3, 1980]

The above-entitled matter duly came on for trial in Courtroom No. 14 of the above-entitled Court at 9:00 A.M. on May 27, 1980 before Honorable Manuel L. Real, United States District Judge, sitting without a jury, a jury having been expressly waived by the parties. Nathan Goldberg, Esq. appeared for plaintiff and Richard R. Terzian, Esq. appeared for defendants. The Court having weighed and considered all the evidence, and having observed the demeanor and determined the credibility of the witnesses, and the parties having had a full and fair opportunity to present their respective cases and the Court having granted the motion of defendants for involuntary dismissal of the second claim in the Complaint pursuant to Rule 41(b) of the Federal Rules of Civil Procedure at the close of plaintiff's case, and having thereafter at the close of defendants' case notified the parties of its intention to rule in favor of defendants on the first claim, makes the following:

FINDINGS OF FACT

1. Deborah Lynn Thorne ("Plaintiff") was employed by the City of El Segundo ("City") as a clerk-typist in its Police Department on December 3, 1973, and remained employed in that capacity until November 8, 1978.

2. Commencing in 1976, Plaintiff had social relationships with several police officers also employed by City. She had sexual relations with one of these individuals which resulted in her pregnancy.

3. Plaintiff's pregnancy was terminated in April, 1977, for which she took two days off from work and did not disclose to the City the true reason therefor.

4. The nature of Plaintiff's social and sexual relationships with other individuals in the Police Department, the fact of her pregnancy and its termination were known by a number of other employees within said department at or around the time such events occurred.

5. After satisfactory completion of her probationary period as a clerk-typist, Plaintiff's attendance and promptness were substandard for the remaining period of her employment, and her use of sick time exceeded the average of other City employees during that same period.

6. Commencing in the fall of 1977 and continuing thereafter into the summer of 1978, Plaintiff filed applications with 12 police departments of various cities in Los Angeles County seeking employment as a police officer, with respect to all of which applications she was either rejected, failed to pass one or more necessary tests, or voluntarily terminated the application process.

7. At all times relevant hereto, Plaintiff had neither applied for nor served as a reserve police officer, police cadet or police service officer with any city, and her only law enforcement training or experience was limited to a few

units of police science taken but uncompleted at the time of application to the El Segundo Police Department at a community college. [MANUEL L. REAL]

8. In January, 1978, City conducted a closed promotional examination to fill an opening for one police officer trainee, which examination was limited to persons already employed by City.

9. Plaintiff applied for said position and, after taking oral and written examinations, was placed second upon a list of four applicants. First place on the list was held by a female named Jeannie Metcalfe ("Metcalfe"), third place by a male named Allison Graham ("Graham"), and fourth place by another male.

10. The usual practice of City after obtaining a list of police trainee applicants was to have them undergo physical, psychological and polygraph examinations as well as personal background investigations.

11. Plaintiff met the minimum entrance physical agility standards by passing a physical agility test and was deemed psychologically qualified to serve as a police officer if closely supervised. Though the examination was a pass-fail the plaintiff's success in passing was marginal. [MANUEL L. REAL]

12. In connection with her application, Plaintiff had submitted a personal history statement which failed to disclose the termination of her pregnancy described in Finding No. 3 above, and which was significantly at variance with her explanation of the same incident on a contemporaneous employment application which she had filed with the Inglewood Police Department.

13. A polygraph examination was required for all police officer applicants of City and such examinations had been conducted for some years by an independent contractor, defendant John Hampton ("Hampton").

14. Hampton was requested by the City's background investigator to inquire as to the discrepancy described in Finding No. 12 as well as the nature of the relationships which she had had with certain City police officers.

15. Plaintiff knowingly consented in writing to taking of the polygraph examination, the dissemination of information gained therefrom to City personnel, and the release of liability with respect thereto prior to commencement of the examination.

16. The great bulk of the polygraph examination consisted of written and oral questions concerning Plaintiff's general background and focusing upon possible criminal activity, drug use, alcohol use, employment record, and health matters. Said examination was the same as given all other applicants for the City's police department. [MANUEL L. REAL]

17. The number of questions in the examination, both oral and written, relating to sexual activities were comparatively few in number and focused primarily upon Plaintiff's sexual relationships with other City employees.

18. During the course of the examination, Plaintiff did not refuse to answer questions, did not seek to terminate or limit its scope, or otherwise object to the procedure in general or to any specific questions, although the instructions in the written question advised her she could do so. [MANUEL L. REAL]

19. Hampton did not orally agree with Plaintiff that sexually-related information would not be relayed to persons within the City's management concerned with hiring. [MANUEL L. REAL]

20. Hampton thereafter submitted two reports to defendant James H. Johnson ("Johnson") as City's Chief of Police, one of which related primarily to Plaintiff's sexual involvement with other City employees.

21. Johnson held a private conversation with Plaintiff after receiving the reports, and offered her the opportunity to withdraw from further processing of the application. In so acting, Johnson was seeking to protect Plaintiff from further dissemination of the information relating to her sexual activities.

22. Plaintiff decided to go forward with the application and, Johnson instructed defendant J. C. Devilbiss ("Devilbiss"), a captain serving in the Police Department, to supervise personally the balance of the background investigation with a view toward maximizing the confidentiality of the sexually-related material and to make a recommendation concerning said employment.

23. Devilbiss thereafter consulted with Officer James Antonius ("Antonius") of the City's Police Department, who was in the process of completing the background investigation. After weighing the various favorable and unfavorable factors concerning Plaintiff's prospective appointment, Devilbiss made a recommendation based thereon to Johnson. Devilbiss's recommendation was against hiring Plaintiff as police officer. [MANUEL L. REAL]

24. At the time of Plaintiff's application, City operated its personnel selection system under the so-called "rule of three", pursuant to which selection is made from among the top three on the list of qualified applicants. Although the City has often made such selections in chronological order of qualification, such procedure is not mandated by applicable City regulations, nor invariably followed.

25. City stood ready to appoint Metcalfe to the available police officer position, had she completed her remaining tests satisfactorily. Metcalfe accepted appointment as a police officer with another jurisdiction before completion of her application process with City.

26. The criteria upon which Johnson made his determination concerning Plaintiff were objective factors such as Plaintiff's tardiness and sick time record as compared to the other candidates and subjective factors applied in good faith, such as aggressiveness, self-assurance, motivation, candor and high moral standards. Said criteria are valid and were applied equally to both male and female applicants for police officer positions.

27. Johnson determined in good faith that Plaintiff, at the time of her application, failed to meet said criteria for selection as a police officer trainee.

28. The extent to which Plaintiff's sexual relationships with other city employees was a factor in the employment decision, if at all, is unascertainable.

29. Even in the absence of any factor relating to Plaintiff's sexual relationships, City would have made the same employment decision with respect to Plaintiff.

30. Sexual relations among officers in a paramilitary organization such as a police department are an appropriate matter of inquiry with respect to employment in light of their possible adverse effect on morale, assignments, and the command-subordinate relationship.

31. None of the individual defendants disclosed Plaintiff's answers to sexually-related questions in the polygraph examination except to the minimum extent to conduct an adequate background investigation of Plaintiff.

32. Even if Hampton asked, in writing and orally, sexually-related questions of the type and nature testified to by Plaintiff, he transmitted only information concerning Plaintiff's relationships with City employees to Johnson and under all circumstances any invasion of Plaintiff's privacy was neither gross nor a flagrant abuse.

33. There was no substantial evidence supporting any inference of plan, design, or conspiracy between or among any one or more of the individual defendants to invade the privacy of Plaintiff or to deny her employment or promotion with the City on the basis of her sex or upon any other impermissible basis.

34. City had no power to discipline Plaintiff or any individual City police officer with whom she was involved for their sexual activities under the circumstances herein.

35. No disciplinary action with respect to Plaintiff's sexual relationships with other City employees was taken against either Plaintiff or any one or more of those persons, nor was the individual who was reportedly father of the unborn child promoted thereafter.

36. Plaintiff's rejection for promotion occurred on or about June 13, 1978, and the third person on the list, Graham, was appointed to the job on July 31, 1978. There is no evidence to show that during the entire course of the personnel selection process, Graham was treated any differently from the way Plaintiff or any other female applicant would have been treated.

37. Subsequent to her rejection, Plaintiff continued in the same duties she had previously performed. Although she was reprimanded for tardiness and sick leave thereafter, she was not treated any differently than any other employee under the same circumstances would have been and the conditions of her employment between the time of her rejection and the time of her resignation on November 8, 1978 were essentially the same as they had been before and were not intolerable as a matter of law.

38. On or about October 25, 1978, Plaintiff voluntarily submitted her resignation from the City's employ effective November 8 based upon her belief at that time that she had another job elsewhere.

39. Several days thereafter, Plaintiff requested an extension of her employment with City beyond November 8 and was requested by Johnson to provide a memorandum indicating that she would improve her tardiness and sick time record. Plaintiff subsequently submitted only a request to withdraw her resignation, which request was denied by City.

40. Plaintiff's subsequent application for unemployment compensation was denied by the California Unemployment Compensation Appeals Board on the grounds that she had voluntarily resigned without good cause, which decision subsequently became final.

41. Plaintiff incurred no hospitalization or medical expenses as a result of any of the events described above, nor did she suffer any damage to her reputation or adverse physical or emotional affects arising therefrom.

42. There was no evidence that the employment criteria and determinations by defendants would not have been equally applied to males nor was there any evidence of disparate treatment given to Plaintiff as opposed to male applicants.

43. Plaintiff is not presently qualified to serve as a police officer and it is uncertain as to when, if ever, she will be so qualified.

44. No one or more of defendants made any disclosure or performed any act to affect adversely Plaintiff's ability to obtain employment anywhere else.

45. Plaintiff was not presented any credible evidence concerning any damages. [MANUEL L. REAL] To the extent that the above findings of fact are deem[illegible] conclusions of law, they are hereby so designated. Based upon the foregoing, the Court reaches the following:

CONCLUSIONS OF LAW

1. To the extent that a right of privacy protectable under the United States Constitution exists, Plaintiff's interest therein was not invaded.

2. Johnson, Hampton and Devilbiss did not conspire to violate any of Plaintiff's constitutional rights or otherwise harm her.

3. Plaintiff failed to establish a prima facie case for employment discrimination in that she failed to show that she was qualified for the position offered.

4. Even if Plaintiff had established such prima facie case, defendants articulated valid, non-discriminatory reasons for the failure to hire, and such reasons were not pretext.

5. Plaintiff would not have been hired even in the absence of any discriminatory factor that may have entered into consideration by defendants.

6. Plaintiff voluntarily resigned her job with the City without good cause as of November 8, 1978.

To the extent that the foregoing are considered findings of fact, they are hereby so designated.

Although the Court has directed counsel for defendants to prepare the above findings of fact and conclusions of law in preliminary form for the convenience of the Court, each and all of them have been carefully scrutinized by the Court and reflect the Court's own decision rather than any mechanical adaptation thereof.

Let judgment be entered accordingly.

DATED: June ...., 1980
JULY 3, 1980.

/s/ MANUEL L. REAL

United States District Judge

FOR PUBLICATION

Appendix B

United States Court of Appeals, for the Ninth Circuit.

Nos. 80-5618, 80-5699; D.C. No. CV 79-3776-R.

Deborah Lynn Thorne,
Plaintiff-Appellant, Cross Appellee,
v.
City of El Segundo, J.C. Devilbiss, James Johnson, and John Hampton, Defendants-Appellees, Cross-Appellant.

Appeal from the United States District Court for the Central District of California.

Hon. Manuel L. Real, Chief District Judge, Presiding.

Argued and Submitted: April 4, 1983

Filed: Nov. 21, 1983.

OPINION

BEFORE: GOODWIN, TANG, and FLETCHER, Circuit Judges

FLETCHER, Circuit Judge:

Appellant, Deborah Lynn Thorne, appeals from the district court's dismissal of her claim against defendants Devilbiss, Johnson, and Hampton under 42 U.S.C. § 1983 for invasion of constitutionally protected privacy and associational interests, and from the court's adverse judgment, following a bench trial, on her sex discrimination claim against the City of El Segundo under Title VII, 42 U.S.C. § 2000e *et seq.* The district court dismissed the section 1983 claim under Federal Rule of Civil Procedure 41(b) at the end of Thorne's case, on the ground that the evidence showed no right to relief. The court rejected the Title VII claim after trial on the grounds that Thorne had failed to establish a prima facie case of disparate treatment, and that, in any event, the City had demonstrated legitimate justification for its refusal to hire her. Thorne filed a timely appeal from the district court's judgment and jurisdiction in this court is proper under 28 U.S.C. § 1291 (1976). We

reverse both the district court's dismissal of appellant's section 1983 claim and the judgment on her Title VII claim.

I
FACTS

The following basic facts are undisputed. At the time of trial, the City's police department had 83 officers, of whom only 2 were women. In the previous 9 years, only 3 women had been hired as officers, one of whom failed to pass the probationary period.

Thorne was hired by the City of El Segundo in December of 1973 as a clerk-typist in the police department, a position she continued to hold until she left the City's employment in November, 1978. In January of 1978, the City announced a closed (i.e., open only to permanent city employees) promotion examination for persons desiring to become officers on the city police force. At the time of the announcement, the examination consisted of written and oral components to be followed by psychological and polygraph testing and a background investigation. Thorne received the second highest score among the applicants on the combined oral and written tests. Another female applicant received the highest test score. The oral test consisted of interviews with three officers who judged applicants on qualities reflecting their experience and personal fitness for police work. All three rated Thorne as acceptable for appointment as a police officer. Thorne was listed as an eligible applicant on the applicant roster.

After the applicant rankings were published, the City announced that a successful applicant would have to pass a physical agility test. Thorne passed the agility test, which was scored on a pass/fail basis. She also passed the psychological screening. In his written report, the psychologist noted that although Thorne appeared slightly immature she was highly motivated and likely to work out well as a police officer.

In April of 1978, Thorne submitted to the polygraph testing required for police officer candidates. The administration and handling of the results of the polygraph test form the basis of her section 1983 claim for invasion of privacy. The polygraph examiner, defendant John Hampton, had been told by personnel officer James Antonius to look into what was described as a "possible discrepancy" between an application Thorne had filled out for another police department and her El Segundo application. One application reported a dilation and curettage and the other a hospitalization for a "female problem." On the questionnaire Thorne filled out before the polygraph examination, she reported that she had been pregnant and had suffered a miscarriage. Hampton questioned her about this event, and asked who the father of the child was. Thorne was reluctant to reveal the information and said it had been a former officer with the El Segundo police department. Upon further questioning, Thorne revealed that the father was actually a married officer still with the El Segundo police department. Thorne asked Hampton to keep this information confidential. Hampton questioned her further about possible relationships with other department personnel.[1] He warned that she might not be able to complete the rigorous program at the police academy, and suggested she think carefully before quitting her present job.

Hampton reported the information regarding Thorne's affair with the officer in a "confidential report" to Police Chief Johnson, who is also a defendant in this case. Hampton also reported that in his personal opinion Thorne

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[1]Thorne testified that she was also asked a large number of questions about her sexual activities, including when she had first had sex, with whom, etc. She also said she had filled out a questionnaire page on her sexual activities. This questionnaire page was not produced at trial, and Hampton disputed Thorne's version of the interview, claiming he had only asked her sexual questions regarding her associations with police officers.

lacked "sufficient aggressiveness, self-assuredness or probable physical ability to presently handle herself in stress situations." Sometime after receiving the information from Hampton, Chief Johnson had a meeting with Thorne in his office. He warned her that if she pursued her application, he could not guarantee the confidentiality of the information regarding her affair with the officer. After thinking it over, Thorne decided not to withdraw her application. Johnson gave the information to defendant Captain Devilbiss, who was assigned to complete the background investigation on Thorne that had been started by Officer Antonius.

After investigating Thorne's background, Antonius had indicated on the "applicant review checklist" that the results of his investigation were satisfactory in every category. On June 2, 1978, Devilbiss made his report to Captain Johnson. This report, which was not marked "confidential," discussed Thorne's affair with the officer and the resulting pregnancy and miscarriage. It also reported Hampton's conclusion that Thorne lacked sufficient "aggressiveness, self-assuredness, or probable physical ability." In summarizing the results of his investigation, Captain Devilbiss reported that although Thorne had a number of positive attributes, she was deficient for three reasons. First, she had a poor record of tardiness and sick time. Second, she had "barely passed" the physical agility test and was "a very feminine type person who is apparently very weak in the upper body." Third, Thorne had only a very recent interest in police work. Devilbiss concluded by recommending that Thorne be disqualified and the processing of the next applicant on the list be finalized.

Captain Johnson recommended to the City Manager's office that Thorne be disqualified, and on June 13, 1978, Thorne received a letter from the City Manager informing her that her name had been removed from the eligibility

list. The City hired a male, Allison Graham, who had originally been ranked third on the eligibility list.[2] The City had processed Thorne's application before that of the first ranked applicant, Jeannie Metcalfe. Because of the delay in processing her application, Metcalfe feared that El Segundo would not offer her a job and she accepted a position as police officer in another city.[3]

On September 28, 1979, appellant filed this action alleging violations of 42 U.S.C. § 1983 and Title VII, 42 U.S.C. § 2000e *et seq.*[4] She named Police Captain Devilbiss, Police Chief Johnson and Mr. John Hampton, the polygraph examiner, as defendants in the 1983 suit and the City of El Segundo as the defendant in her Title VII action. The case went to trial in May of 1980. At trial, the basic facts were undisputed. However, many particulars of these events and their implications were the subject of conflicting testimony. At the end of Thorne's case-in-chief, the district

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[2]The city hired under what is termed a "rule of three," meaning that the top three applicants on the job roster were considered for an open position without any guarantee that the top applicant could be hired first. Usually, however, the top applicant was hired first. Those remaining on the roster would be eligible for future openings.

[3]Metcalfe testified that Johnson informed her that he would only consider her application if she withdrew pending applications for police officer jobs with other cities. Such a condition apparently was not uniformly required of police officer applicants. She also said Johnson told her that even if she withdrew her other applications she could not be guaranteed the El Segundo job. Metcalfe testified that she felt the City was not willing to hire a woman. She refused to withdraw her other applications and was hired as a police officer by another city. She was never offered a job with the El Segundo Police Department.

[4]Plaintiff filed an administrative complaint with the Equal Employment Opportunity Commission in November of 1978, and received her right-to-sue letter in July of 1979. *See* 42 U.S.C. § 2000e-5(f).

court granted a defense motion for involuntary dismissal of plaintiff's section 1983 claim under Federal Rule of Civil Procedure 41(b). This rule permits dismissal of a claim where, under the applicable law and in view of the evidence presented, a plaintiff has failed to show a right to relief. At the close of the trial, the district court ruled in favor of the City on the Title VII claim because it found that Thorne had not established a prima facie case of discriminatory treatment and that defendants had articulated legitimate, nondiscriminatory reasons for not hiring her. On appeal, Thorne argues that the district court should not have dismissed her section 1983 claim and that the proof on her Title VII claim entitled her to judgment as a matter of law.

II

DISCUSSION

A. Thorne's Title VII Claim.

At trial, Thorne advanced a discriminatory treatment theory. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). She introduced evidence to show that the City refused to hire her because of its stereotyped views of the physical strength and ability of women and because those responsible for reviewing her application applied a different standard of moral integrity to her application than was applied to similarly situated males. After hearing all of the evidence, the district court rejected appellant's claim and ruled in favor of the City. Specifically, the trial court found:

> Plaintiff failed to establish a prima facie case of employment discrimination in that she failed to show that she was qualified for the position offered. . . . Even if plaintiff had established a prima facie case, defendants articulated valid, non-discriminatory reasons for the failure to hire [her] . . . The criteria upon which [Police Chief] Johnson made his determination [to

> disqualify] Plaintiff were objective factors such as Plaintiff's tardiness and sick time record as compared to the other candidates and subjective factors applied in good faith such as aggressiveness, self-assurance, motivation, candor and high moral standards.

The district court erred in concluding that Thorne failed to establish a prima facie case of discrimination. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court described a typical model that would establish a prima facie case of discriminatory treatment. Under this model the plaintiff must show:

> (i) That he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802 (footnote omitted). The formula is not inflexible but must be applied in light of the facts in the specific case under adjudication. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 n.6 (1981). Moreover, "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Id.* at 253.

Thorne easily met this burden. She is a member of a group protected by Title VII. She applied for a position as a police officer with the City. She ranked second among applicants on the oral and written tests for the job. She was rated qualified to be a police officer following psychological testing and she passed the physical agility test required of applicants. In addition, she submitted to the polygraph testing demanded by the police department and there is no indication that her answers on this test were unacceptable or false. Under these circumstances, the dis-

trict court's finding that plaintiff was not qualified for the position of police officer was clearly erroneous.[5] *See Lynn v. Regents of the University of California*, 656 F.2d 1337, 1342 (9th Cir. 1981) (applicant is qualified for position if he or she meets objective criteria for job); *Hagens v. Andrus*, 651 F.2d 622, 625 (9th Cir. 1981) (same). Thorne was rejected for the police officer position and a male was ultimately hired. Thorne established each of the elements of a prima facie case of discriminatory treatment under the *McDonnell-Douglas* model. The district court's conclusion that she failed to carry her burden in this initial phase of the case is based on the erroneous finding that Thorne was not qualified and is patently wrong.

By establishing a prima facie case, appellant created a rebuttable "presumption that the employer unlawfully discriminated against" her. *Burdine*, 450 U.S. at 254. To rebut this presumption "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Id.* at 255. In short, the defendant must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 254. *See generally United States Postal Service Bd. of Governors v. Aikens*, ... U.S. ....., 103 S.Ct. 1479, 1481 (1983).

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[5]We apply the clearly erroneous standard of review to questions of whether a party has established the factual elements of a prima facie case. *See Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 542-45 & n.13 (9th Cir. 1982):

> [t]he district court's findings on what facts were established by a preponderance of the evidence must be accepted on appeal unless clearly erroneous, but . . . the court's determination whether the facts so proved were sufficient to establish an inference of discrimination, in other words whether the plaintiff's proof established a prima facie case thus shifting the burden of production to the defendant, is a legal conclusion freely reviewable on appeal.

694 F.2d at 540.

We agree with the district court's conclusion that the City met this burden of production by presenting evidence that Thorne was disqualified for non-discriminatory reasons such as tardiness and psychological factors. However, our inquiry at this stage in the proceeding is whether this evidence, in the face of Thorne's contrary evidence that discriminatory reasons were the actual basis for her rejection, was sufficient to support the trial court's judgment in favor of the City. We conclude that it was not.

At the third and final stage of a discriminatory treatment case, as outlined recently in *Aikens*, 103 S.Ct. at 1482, the plaintiff must carry the ultimate burden of proving intentional discrimination. "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, *quoted in Aikens*, 103 S.Ct. at 1482. In this case, the thrust of Thorne's proof was to show both that the City's articulated reasons for not hiring her were a pretext for discrimination and that the real reasons she was rejected were the defendants' sex-based physical stereotype of women and a standard of moral integrity that was applied only to women.

The district court rejected Thorne's proof of discrimination, concluding that defendants disqualified her for nondiscriminatory reasons that were not pretextual. A review of the exhibits and the transcript in this case leads us to form the firm conviction that the district court was clearly erroneous in its conclusion that appellant was rejected for nondiscriminatory reasons that were not pretextual.[6]

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[6]As the court noted in *Gay*, we need not decide whether this is the correct standard of review because if we find the district court's conclusion clearly erroneous we would obviously set it aside under the less deferential *de novo* standard. *See Gay*, 694 F.2d at 445-46.

Thorne introduced evidence to show that the alleged nondiscriminatory reasons for which defendants argue she was rejected were a pretext to mask the actual, discriminatory reasons for their refusal to hire her. The evidence is overwhelming that defendants had a stereotyped view of the physical abilities of women which they applied to Thorne. Captain Devilbiss testified that an important factor in his recommendation against appellant was his perception that she lacked sufficient strength to work as a police officer. The following excerpt from his testimony demonstrates that his opinion regarding Thorne's physical abilities was not based on any facts, but on his preconceived ideas about women:

> Q: [By plaintiff's counsel]: Now you also indicate in that same summary [Exhibit 10] that, quote, she is a very feminine type person who is apparently very weak in her upper body, unquote. Now were you basing that on your intuitive feeling?
>
> A: [By Capt. Devilbiss]: Well, I have known Debbie for about—when she was working at the P.D. for about four and a half years. And that was an observation I had made over those years.
>
> Q. What in those four years . . . did she do or not do that caused you to believe that she was apparently very weak in her upper body?
>
> A. Just from her physical appearance.
>
> Q. Is there ever any occasion where she was not able to lift something or do something in the department because of lack of strength?
>
> A. Not that I am aware of.
>
> Q. What did you mean when you said that she was a very feminine type person?
>
> A. Girlish, feminine as opposed to masculine.
>
> Q. Do you recall I took your deposition, Captain?
>
> A. Yes, I recall.

> Q. Reading from page 36, line 3, question: "You indicated that she appears to be a very feminine type person who lacks upper body strength. A: Feminine in regard to not being as strong as a male, perhaps." Does that refresh your recollection as to what you meant by feminine?
>
> A. If that is what I said, yes.
>
> Q. Do you feel that women generally are strong enough to be police officers?
>
> A. Generally speaking, no.

Mr. Hampton shared Captain Devilbiss's evaluation of plaintiff's physical abilities and communicated this evaluation to Chief Johnson in one of his reports:

> I would, as in my general resume, suggest a reserve officer position . . . as I do not believe she could maintain the physical requirements. . . . I am certain that she would never physically complete a regular police academy. This is the reason that I talked to her at length about maintaining her present position until she really proved herself.

Chief Johnson in turn relied on this information in making his decision not to hire plaintiff. Yet, both Johnson and Devilbiss were aware that Thorne had passed the physical agility test. Based on this review of the record, we can only conclude that plaintiff's rejection was, at least in part, based on the perception shared by those charged with reviewing her application that because of her sex she was physically unable to perform as a police officer.

The district court's finding that defendants did not reject Thorne because of the information they uncovered regarding her sexual history also flies in the face of the over-

whelming weight of the evidence.[7] Both Johnson and Devilbiss admitted that it was a factor in their evaluation of Thorne, and defendants concede in their brief that the affair with the officer was considered.[8]

We also conclude that Thorne demonstrated that the moral standard which allowed her affair to be a factor in the City's decision not to hire her was not applied equally to men and women. Trial testimony established that this affair was conducted during off-duty hours, did not interfere with her job performance, and had not become a source of scandal within the department. More importantly, the trial court found that the City had no authority to discipline the officer involved for his role in the affair. The fact that

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[7]For example, Chief Johnson testified as follows:

> Q. [By plaintiff's counsel]: What about the fact that she had an affair with an officer on the department, was that considered [in the decision not to hire plaintiff]?
>
> A. [By Chief Johnson]: It was considered.
>
> Q. That was one of the reasons that you ultimately decided to recommend against her hiring, was it not?
>
> A. It was a consideration.

The only evidence in the record that supports the district court's finding is an isolated statement by Chief Johnson to the effect that at Thorne's unemployment compensation hearing he had told the hearing officer that he would not have hired Thorne regardless of her affair with the police officer. However, Captain Devilbiss testified that one of the reasons he recommended to Chief Johnson that Thorne not be hired was her affair, and it is undisputed that Chief Johnson relied on Captain Devilbiss's recommendation in deciding not to hire her.

[8]Our conclusion is corroborated by internal inconsistencies in the district court's findings. First, it found that appellant was not rejected because of her affair with the officer, then it found that she was rejected because she lacked sufficient moral integrity. The only evidence in the record that could relate to moral integrity, however, is the evidence of her affair. There is, for example, no evidence that Thorne was not honest or lacked other traits that might bear on her moral integrity.

the affair, nonetheless, was an actual reason for the decision not to hire Thorne, a woman, is grounds for an inference that different moral standards were applied to women and men. *See Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (unequal treatment of different sexes in same employment context is significant evidence of sex-based discrimination).

The nondiscriminatory reasons offered by the City and accepted by the district court to justify the refusal to hire appellant are simply incredible and clearly pretextual. These reasons were Thorne's alleged lack of aggressiveness, self-assurance, motivation, candor, and moral standards, plus an unacceptable record of sick leave use and tardiness.

There is no indication that Thorne lacked candor. The polygraph examiner found her truthful. Neither Johnson nor Devilbiss testified that Thorne lacked candor or that this was a factor in their evaluation of her.

The only testimony that relates to Thorne's lack of aggressiveness, confidence and motivation is that of Chief Johnson, who testified that these qualities were important to success as a police officer. Yet there is nothing more than an unspoken inference that Thorne lacked these traits. Nowhere did Chief Johnson testify that he found Thorne unaggressive, insecure or unmotivated. Nor did Captain Devilbiss testify that Thorne lacked these qualities. Only Hampton's report of the polygraph examination, repeated in Captain Devilbiss's report to Chief Johnson, mentions any of these factors. In his confidential report to Johnson, Hampton stated:

> Applicant appears personable, intelligent, well-mannered and able to communicate with others. She admits that she has been drifting along without any goals until recently. . . . My personal opinion is that she

> does not display sufficient aggressiveness, self-assuredness or probable physical ability to presently handle herself in stress situations.

Hampton testified that by "aggressiveness," he meant she had not been aggressive enough in her pursuit of police work. There is, however, no evidence in the record to show that Mr. Hampton was qualified to perform a psychological examination of Thorne. The psychologist hired by the City to evaluate Thorne recommended that she be hired. His report noted that she had "high motivation." One of the factors considered by the three oral examiners who tested Thorne was her interest in police work. Although all three noted that her interest in police work was recent, all three rated her as an acceptable candidate. Johnson's and Devilbiss's rejection of the evaluations of those chosen by the City to evaluate Thorne's psychological capability in favor of the impressions of a polygraph examiner (who merely expressed doubts and did not even go so far as to recommend Thorne be disqualified) casts doubt on the bona fides of these criteria as a basis for their decision.

We reach a similar conclusion with respect to the other reason proffered by the defendants for not hiring appellant. Although Thorne's performance reviews for the years before the 1977-78 rating year indicated problems with use of sick time and tardiness, they also showed continuing efforts to improve. Attendance may be a legitimate factor in an employment decision, but the circumstances of this case demonstrate that any decision made to disqualify Thorne on this basis was not made in good faith. First, neither Devilbiss nor Johnson made any attempt to discuss Thorne's performance with her current supervisor, who rated her as acceptable in promptness and attendance for the year just prior to her application. Second, Johnson himself recognized that Thorne's tardiness (averaging 5 to 7 minutes, twice a week) had been tolerated by her supervisors; thus, there was no basis to expect a continuation

of this behavior in a job where it would not be tolerated. Third, Antonius testified that tardiness and sick leave records were not a normal part of the background investigation, casting considerable doubt on Johnson's testimony that this was an important factor in his decision. This is supported by the fact that while at trial defendants presented a comparison of Thorne's attendance record with those of the other two applicants, there was no evidence that this comparison had been made at the time Thorne was rejected. Accordingly, we cannot accept the finding that Chief Johnson considered, as a legitimate reason for rejecting Thorne, her tardiness and sick time records.

The evidence in the record is more than sufficient to justify the legal conclusion that, in fact, Thorne was rejected because of intentional discrimination in violation of Title VII. A refusal to hire a woman because of a sex-stereotyped view of her physical abilities is the kind of invidious discrimination that violates Title VII. *See Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1224-25 (9th Cir. 1971). Similarly, application to women of a standard of moral integrity that is not applied equally to men violates Title VII. *See Gerdom*, 692 F.2d at 608-09. Thorne's evidence was sufficient to prove that sex-stereotyping and unequal job standards were applied to her.

The district court's judgment against Thorne on her Title VII claim is, therefore, reversed. The case is remanded to the district court for entry of judgment in Thorne's favor on her Title VII claim, and for an award of appropriate relief.

B. Thorne's Section 1983 Claim.

Thorne claims violations of 42 U.S.C. § 1983 by three individual defendants, Devilbiss, Johnson, and Hampton. She introduced evidence that, she argues, proved that the administration and handling of the polygraph examination and its results by the individual defendants invaded her

constitutionally protected rights of privacy and free association and that these infringements were accomplished under color of state law. On this aspect of the case the district court granted defendants' motion under Federal Rule of Civil Procedure 41(b) for involuntary dismissal at the close of plaintiff's evidence. We review the dismissal as we would a judgment in defendants' favor following a trial to the court. *See Wilson v. United States,* 645 F.2d 728, 730 (9th Cir. 1981). Findings of fact are reviewed for clear error; *id;* legal conclusions are reviewed under a *de novo* standard. In this case, we find that the district court erred both in its findings of fact and in its conclusions of law.

The constitution protects two kinds of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599 (1977). Both are implicated in this case. Thorne presented evidence that defendants invaded her right to privacy by forcing her to disclose information regarding personal sexual matters. She also showed that they refused to hire her as a police officer based in part on her prior sexual activities, thus interfering with her privacy interest and her freedom of association.

The interests Thorne raises in the privacy of her sexual activities are within the zone protected by the constitution. This conclusion follows from the cases holding that such basic matters as contraception, abortion, marriage, and family life are protected by the constitution from unwarranted government intrusion. *See Kelly v. Johnson,* 425 U.S. 238, 244 (1970); *Roe v. Wade,* 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The evidence shows that Thorne's employment was indeed conditioned on her answering questions regarding her sexual associations. Before the polygraph examination,

Thorne was given forms explaining the procedure and the questionnaires she was to fill out. Although one form informed her that she could refuse to answer questions, another warned that reluctance to answer personal questions would be interpreted by the examiner as an indication of serious emotional or sexual problems. Hampton himself noticed that Thorne was reluctant to discuss her affair with the officer. Under these circumstances, it is impossible to conclude that Thorne' participation in the polygraph examination was anything other than a necessary condition of her employment as a police officer.

A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment. *See, e.g., Kelley,* 425 U.S. at 245; *Elrod v. Burns,* 427 U.S. at 347, 357-59 (1976). The more fundamental the rights on which the state's activities encroach, the more weighty must be the state's interest in pursuing that course of conduct. *Compare Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977) (holding that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged regulation") *with Kelley,* 425 U.S. at 245 (asserted substantive liberty interest of police officer in matters of personal appearance assumed to be protected by fourteenth amendment, but state interests underlying infringing regulation only subjected to rational relation test). In this case the inquiry by the City of El Segundo that appellant challenges under section 1983 bears on those matters acknowledged to be at the core of the rights protected by the constitution's guarantees of privacy and free association—appellant's interest in family living arrangements, procreation and marriage. *See, e.g., Briggs v. North Muskegon Police Department,* 563 F.Supp. 585 (W.D. Mich. 1983) (sustaining police officer's challenge to city's termination

of his employment because of his cohabitation with a woman to whom he was not married). Accordingly, the City must show that its inquiry into appellant's sex life was justified by the legitimate interests of the police department, that the inquiry was narrowly tailored to meet those legitimate interests, and that the department's use of the information it obtained about appellant's sexual history was proper in light of the state's interests.

Defendants' own evidence shows a sufficient invasion of Thorne's privacy interests to require justification. The information about the polygraph examination given to Thorne indicated that questioning about sexual behavior would be a significant part of the overall examination. Indeed a specific page of instructions was devoted to the importance of answering questions about sex. These instructions, in part, state:

> There are many psychological sexual problems created because of one's religious, moral or other standards. Some of these problems may form the basis of a deviancy that could materially affect one's ability to properly function as an employee of a law enforcement agency.
>
> [T]his [psychological sexual problem] is a major problem area in the overall interview. On-the-job sexual or perverted deviancies can be cause for termination of employed personnel.

Hampton admitted he inquired into any social or sexual relations Thorne may have had within the police department, whether on duty or off. He pressed her to name the father of the child she lost.

Defendants attempted to link questions about an applicant's sexual history to his or her ability to perform as a police officer. The district court found that "[s]exual relations among officers in a paramilitary organization such as a police department are an appropriate matter of inquiry

with respect to employment in light of their possible adverse effect on morale, assignments, and the command-subordinate relationship." This may be true. However, the inquiry in this case was not limited to this sort of information. Hampton was quite clearly concerned with whether Thorne had had an abortion, a matter totally irrelevant to "on-the-job sex."[9] The only other alleged justification for inquiry into an applicant's sexual activities was a concern for discovering "deviancies." Hampton's questions regarding a possible pregnancy and abortion and the identity of Thorne's sexual partners were not directed toward discovering "deviancies," and none were in fact discovered.

We do not hold that the City is prohibited by the constitution from questioning or considering the sexual morality of its employees.[10] If the City chooses to regulate its

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[9]Although there was much discussion at trial of a "discrepancy" in Thorne's applications there is no basis at all for the trial court's finding that "Plaintiff had submitted a personal history statement which failed to disclose the termination of her pregnancy . . . and which was significantly at variance with her explanation of the same incident on a contemporaneous employment application which she had filed" with another department. Thorne reported a "DNC" on one form and a "female problem" on another. It is impossible rationally to read this as a "discrepancy" requiring investigation. The El Segundo application did not ask about pregnancy or miscarriage. On the questionnaire Thorne filled out before her polygraph exam she reported a pregnancy and miscarriage. There is no basis here for a contention that inquiry into this area was justified by a concern over whether Thorne was being truthful. Hampton himself testified that he wanted to see if Thorne would report an "abortion" and in his written reports discussed Thorne's "abortion." Thorne testified that she had had a miscarriage.

[10]*See, e.g., Akron v. Akron Center for Reproductive Health,* . . . U.S. . . . , 103 S.Ct. 2481, 2491 (1983). ("[I]t cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). (If the state has a heightened interest in regulating the speech of

employees in this area or to set standards for job applicants it may do so only through regulations carefully tailored to meet the City's specified needs. The evidence established here that the City had no policy. Rather, Johnson testified that he simply applied the moral standards of the general society, as he saw them. Moreover, Hampton's questioning in the area of sexual activity was not regulated in any way. He was given free reign to inquire into any area he chose.

The City set no standards, guidelines, definitions or limitations, other than the polygraph examiner's own personal opinion, as to what might be relevant to job performance in a particular case. When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests, as the questioning of the polygraph examiner did in this case, an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action. We cannot even bestow legitimacy on the defendants' search for "perverted deviancies" in this case, because of the complete lack of standards for the inquiry. The risk that an infringement of an important constitutionally protected right might be justified on the basis of individual bias and disapproval

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its employees—conduct at the core of the first amendment—"there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.") *Kelley v. Johnson*, 425 U.S. at 245. In *Kelley*, the Supreme Court upheld a police department's hair length regulation against a challenge on first and fourteenth amendment grounds. *Id.* at 247-48. In the wake of that decision, other courts have noted that the state's interest in regulating the conduct of its employees is perhaps at its greatest where paramilitary organizations, such as a police force, are involved. *See, e.g., Shawgo v. Spradlin*, 701 F.2d at 482-83.

of the protected conduct is too great. The very purpose of constitutional protection of individual liberties is to prevent such majoritarian or capricious coercion. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see also Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."); *see generally*, L. Tribe, *American Constitutional Law* 569-577 (1978).

Even had the questions in this case been permissible, the use of the information in the decision to disqualify Thorne was not. In the course of the polygraph examination, defendants discovered that Thorne had engaged in an affair with an officer of the El Segundo police force. The affair had resulted in her pregnancy and a subsequent miscarriage. Thorne indicated that the affair had ended. This information was communicated to the Chief of Police in reports by both Hampton and Devilbiss. Hampton's report indicated that appellant "revealed the above information, as she wanted to be truthful as to the polygraph examination," and the examiner concluded that the information did not reveal "any sexual deviant behavior." Nonetheless, one of the reasons Chief Johnson decided that Thorne should not be hired was her affair with an officer on the police force.

In the absence of any showing that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy and free association have an impact upon an applicant's on-the-job performance, and of specific policies with narrow implementing regulations, we hold that reliance on these private non-job-related considerations by the state in rejecting an applicant for em-

ployment violates the applicant's protected constitutional interests and cannot be upheld under any level of scrutiny. *See, e.g., Moore v. City of East Cleveland,* 431 U.S. at 499 (heightened scrutiny where more substantial privacy interests implicated); *Kelley v. Johnson,* 425 U.S. at 245 (minimal scrutiny where minimal interests involved). In this case, defendants have never attempted to introduce evidence that would show that appellant's affair with a police officer before becoming a police officer, herself, affected or could potentially affect her job performance. The interests defendants alleged to justify a concern with applicants' sexual histories are not implicated in this case. There was no indication of any sexual deviance. The affair was not a matter of public knowledge, and could not therefore diminish the department's reputation in the community. There was no reason to believe Thorne would engage in such affairs while on duty, or that the affair which had ended was likely to revive or cause morale problems within the department. Thorne's conduct would not be a ground for discipline of a police officer, nor had any disciplinary measures against the officer involved been attempted.

Accordingly, we must conclude that the district court erred in finding that neither the questioning of appellant regarding her sex life nor reliance on the information obtained about her sex life violated her privacy and associational interests. *See, e.g., Briggs v. North Muskegon Police Department,* 563 F.Supp. at 591 (holding that dismissal of police officer violated officer's constitutional rights in the absence of a showing that cohabitation affected job performance); *Shuman v. City of Philadelphia,* 470 F.Supp. 449, 459 (E.D. Pa. 1979) (holding that regulations permitting inquiry into off-duty relationship of police officers exceed scope of state's legitimate interests and violated officer's constitutional rights). Because the district court erred in dismissing Thorne's section 1983 claim under Federal Rule of Civil Procedure 41(b), we vacate that portion of the judgment and remand for further proceedings as the

district court may find necessary.[11] Judgment should be entered for Thorne on her Title VII claim. In light of the full presentation of evidence in the Title VII action, it would appear the only material evidence defendants may offer on remand of the 1983 action is evidence to prove that they are entitled to qualified good-faith immunity.

The district court will have to determine the amount of damages in both the Title VII and the section 1983 actions. We point out that the court's finding that Thorne had presented no credible evidence of damages is clearly erroneous. At a minimum, she has lost the wages she would have received as a police officer. Thorne also testified that she suffered emotional distress, humiliation, and loss of sleep due to defendants' actions, damages which defendants concede are available under section 1983.[12]

REVERSED and REMANDED.

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[11]On appeal, defendant Hampton argues that he cannot be liable in the 1983 action because he acted as an independent contractor rather than a state employee. Hampton argues, citing *Dennis v. Sparks*, 449 U.S. 24 (1980), that as a private person, he is not liable under § 1983 unless plaintiff proves a conspiracy between state officials and himself. There is nothing in the record to support the contention that Hampton was not acting under color of law. In administering the polygraph examination, Hampton acted on the City's behalf and was paid by the City. *See Griffin v. Maryland*, 378 U.S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action."). A conspiracy with City officials must be shown only where, as in *Dennis*, the defendant has not otherwise acted under color of law.

[12]The cross-appeal is mooted by the result in 80-5618.

Appendix C

United States Court of Appeals, for the Ninth Circuit.

Deborah Lynn Thorne,
Plaintiff,

vs.

City of El Segundo;
J. C. Devilbiss, James Johnson and John Hampton,
Defendants.

Nos. 80-5618, 80-5699.
[Filed: Feb. 23, 1984.]

ORDER

Before: GOODWIN, TANG, and FLETCHER, Circuit Judges

The panel as constituted in this case has voted to deny the petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

Appendix D

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 2000e.

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March

24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations

Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication

among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where

the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his

religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual fo employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of

such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-3.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training

programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

§ 2000e-4.

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this

section, shall appoint, in accordance with the provisions of Title 5 governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges, and employees as he deems necessary to assist it in the performance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates: *Provided,* That assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5.

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7824 of Title 5, notwithstanding any exemption contained in such section.

§ 2000e-5.

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation

that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local

law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency

with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section

or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain a voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or

temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 22, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in

every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section2000e-3(a) of this title.

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section,

the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

§ 2000e-6.

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney Gen-

eral shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be

transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

42 § 2000e.

In suit under this subchapter, district court on remand should immediately enjoin present policies and practices which were discriminatory or which, no matter how neutral in appearance, perpetuated effects of past discrimination and should promptly formulate effective affirmative injunctive relief to extent that it found present effects of past discrimination. U.S. by Clark v. Dillon Supply Co., C.A.N. C.1970, 429 F.2d 800.

§ 2000e-7.

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

§ 2000e-8. Investigations

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Com-

mission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the

court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission

who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

§ 2000e-9.

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

§ 2000e-10.

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

§ 2000e-11.

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

§ 2000e-12.

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject

to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

§ 2000e-13.

The provisions of sections 111 and 1114, Title 18, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

§ 2000e-14.

The Equal Employment Opportunity Commission shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations,

functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 of each year, the Equal Employment Opportunity Commission shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

§ 2000e-15.

The President shall, as soon as feasible after July 2, 1964, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

§ 2000e-16.

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid

from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken

by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

§ 2000e-17.

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5, and the following pertinent sections: *Provided,* That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply; *Provided further,* That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Appendix E

Reporter's Transcript of Proceeding

In the United States District Court
Central District of California
No. CV 79-03776-R
Honorable Manuel L. Real, Judge Presiding
Deborah Lynn Thorne, Plaintiff,

vs.

City of El Segundo; J. C. Devilbiss James Johnson and John Hampton, Defendants.

Cross—Johnson

Q. Did you take into consideration the result of the psychological screening report when you evaluated Miss Thorne as a candidate?

A. Yes, I did.

Q. Now, that report was not yet prepared, I mean the actual report, is that right?

A. We had, I am not sure when the ultimate report was prepared. We had had a prior verbal analysis given to us by the doctor.

Q. You also took into account, did you not, the opinions of John Hampton and Captain John Devilbiss as expressed in the memorandum of June 2nd, 1978, regarding assertiveness or lack thereof?

A. And my own observations which I would hope I took them all in, yes, into consideration.

Q. You mention your own observations. Are you saying that you took into consideration your observations of Miss Thorne in judging her assertiveness, her presence, her psychological qualities?

A. Yes.

Q. Was there ever any point in time when you felt that she was lacking in assertiveness or aggressiveness?

A. In the position that she was currently—that she currently held, I would say no. There may have . . .